JALLCON (M) SDN BHD

v.

NIKKEN METAL (M) SDN BHD (NO 3)

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL MALIK ISHAK J
[CIVIL SUIT NO: S5-22-690-98]
11 SEPTEMBER 2002

CIVIL PROCEDURE: *Want of prosecution - Striking out action for want of prosecution - Guiding principles - Multiple actions involving appeal to Court of Appeal - Outcome of appeal could lead to consolidation of actions - Failure to set main action for trial pending appeal - Delay - Whether intentional and contumelious - Whether actuated by practicality of situation - Whether justified - Rules of the High Court 1980, O. 25 r. 1, O. 34 rr. 2(2), 8(1)*

This was an application by the defendant to strike out the plaintiff's writ and statement of claim ('the main suit') for want of prosecution. The facts were that the defendant had filed a counterclaim against the main suit and had obtained summary judgment for the same. However, having allowed summary judgment, the learned Senior Assistant Registrar ('SAR') granted the application for a stay order thereof. The plaintiff appealed to the judge in chambers against the decision allowing summary judgment, while the defendant cross-appealed against the stay order. The appeal and cross-appeal were dismissed by the learned judge whereupon the plaintiff appealed against that part of the learned judge's order affirming the grant of summary judgment. The plaintiff had intended to consolidate the hearing of the main suit and the counterclaim should its appeal to the Court of Appeal aforesaid succeed, and in the circumstances, pending the outcome of the appeal, did not take any step to set down the main suit for trial. The defendant took the plaintiff's inaction as intentional and contumelious and so applied to strike out the main action. The plaintiff argued that the delay in filing the summons for directions was in the circumstances justified, and in any case was neither intentional nor contumelious.

Held:

[1] Clearly, if the plaintiff succeeds in the Court of Appeal, the parties would be in a position to proceed with the trial of both the main suit and the counterclaim and to dispose of them at the same time. It cannot be denied that the main suit and the counterclaim were directly related and entwined with one another, so that both the claim and the counterclaim would in all likelihood require the presence and attendance

of the same witnesses and experts. There was thus merit in the plaintiff's contention that what it did was motivated by the practicality of the situation, as well as by the sincere desire to avoid wastage of court's time and to save the costs and expenditure by holding one trial instead of two. (pp 410 g-i & 411 a)

[1a] Since there were cogent and sincere reasons as to why the summons for directions was not filed within the strict parameters of O. 25 Rules of the High Court 1980 ('RHC'), there was no inexcusable and inordinate delay on the part of the plaintiff in prosecuting its claim in the main suit. (p 412 d)

[2] The defendant had not furnished details of any inexcusable and inordinate delay alleged. The mere allegation of 'inexcusable and inordinate delay' without elaborating further does not make a delay inexcusable and inordinate in any way. The defendant needed to go further and itemise the delay which was said to be inexcusable and inordinate. This the defendant had failed to do. (p 414 d-g)

[3] Under O. 25 RHC, there was no bar to the defendant to take out the summons for directions in the event that the plaintiff had failed to do so. If indeed the defendant had been prejudiced by the denial of their 'fruits of litigation' as alleged, surely the defendant could remedy that by filing the summons for directions and expeditiously despatch the action for trial. (pp 416 h & 417 a)

[Application dismissed.]

Case(s) referred to:

Bernard Chai v. Klang Port Authority [1999] 5 CLJ 481 ***(refd)***
Birkett v. James [1977] 2 All ER 801 ***(refd)***
Dato' Leong Pow Kue & Ors v. Gan Kim Sing; Pentadbir Tanah Daerah Johor Bahru & Ors (Third Parties) [1999] 5 CLJ 426 ***(refd)***
Fenghua Development Sdn Bhd v. Asia Commercial Finance (M) Sdn Bhd [1999] 8 CLJ 166 ***(refd)***
Ho Weng Kong v. Mann Foong Realty Sdn Bhd & Anor [2000] 6 CLJ 478 ***(refd)***
Jallcon (M) Sdn Bhd v. Nikken Metal Industries Sdn Bhd [2000] 6 CLJ 485 ***(refd)***
Jallcon (M) Sdn Bhd v. Nikken Metal (M) Sdn Bhd (No 2) [2001] 6 CLJ 23 ***(refd)***
Janov v. Morris [1981] 3 All ER 780 ***(refd)***
Khor Cheng Wah v. Sungai Way Leasing Sdn Bhd [1997] 1 CLJ 396 ***(refd)***
KS Chua & Co v. Chui Miang Chew & Ors [1996] 2 CLJ 676 ***(dist)***
Lee Mun Tuck v. Tan Chin Kah & Anor [1991] 1 CLJ 631; [1991] 4 CLJ (Rep) 929 ***(refd)***
Mercantile Bank Ltd v. JP Pereira [1979] 2 MLJ 1 ***(refd)***
Sim Lim Finance Ltd v. Highlight Industry (Pte) Ltd & Ors [1987] 1 MLJ 182 ***(refd)***

TM Feroze Khan & Ors v. Meera Hussain TM Mohamed Mydin [1999] 4 CLJ 373 ***(refd)***

Trustees of Leong San Tong Khoo Kongsi (Penang) Registered v. Lee Boon Tin [1998] 4 CLJ 368 ***(refd)***

United Malayan Banking Corp Bhd v. Palm and Vegetable Oils (M) Sdn Bhd & Ors [1994] 3 CLJ 144 ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 25 r. 1, O. 34 rr. 2(2), 8(1)

For the plaintiff -Yip Huen Weng; M/s David Lingam & Co
For the defendant - Lam Chong Seng; M/s CS Lam & Co

Reported by WA Sharif

JUDGMENT

Abdul Malik Ishak J:

Introduction

This is the third judgment involving the same parties. The first judgment was reported in the Current Law Journal *vide Jallcon (M) Sdn Bhd v. Nikken Metal Industries Sdn Bhd* [2000] 6 CLJ 485. The second judgment was reported in two local law journals, namely, the Current Law Journal and the Malayan Law Journal and the citation would be as follows: *Jallcon (M) Sdn Bhd v. Nikken Metal (M) Sdn Bhd (No 2)* [2001] 6 CLJ 23 and [2001] 5 MLJ 716.

By way of encl. 63, the defendant sought to strike out the writ of summons and the statement of claim dated 27 October 1998 for want of prosecution. The learned deputy registrar in the person of Madam Madihah Harullah had on 13 July 2001 dismissed the defendant's application in encl. 63 with costs. Aggrieved by the decision of the learned deputy registrar, the defendant filed an appeal to the judge in chambers as seen in encl. 77. This judgment revolved on encl. 77.

In brief, the chronology of events may be stated as follows:

(1) On 27 October 1998, the writ of summons and the statement of claim were filed.

(2) On 27 May 1999, the defence and the counterclaim were filed.

(3) On 18 June 1999, the reply was filed.

(4) The defendant applied for summary judgment against the plaintiff for the counterclaim as seen in encls. 35 and 36.

(5) On 8 December 1999, the learned Senior Assistant Registrar granted summary judgment against the plaintiff but the plaintiff was allowed a stay of execution until the full and final disposal of the main suit.

(6) The plaintiff then appealed against the decision of the learned Senior Assistant Registrar to the judge in chambers as seen in encl. 43 while the defendant cross-appealed against the decision of the learned Senior Assistant Registrar in granting the stay to the judge in chambers as seen in encl. 44.

(7) On 19 February 2001, I dismissed encl. 43 with costs and I too agreed with the decision of the learned Senior Assistant Registrar in ordering the stay – which meant that the *status quo* was maintained. For clarity, I need to reproduce that part of my judgment as seen in the second judgment (see *Jallcon (M) Sdn Bhd v. Nikken Metal (M) Sdn Bhd (No 2)* [2001] 6 CLJ 23 at p. 43) and I do so now:

> For the reasons adumbrated above, I dismissed the plaintiff's appeal in encl. 43 with costs. Without hesitation, the decision of the learned SAR must be confirmed forthwith. The stay of execution of the Order 14 judgment in the context of the counterclaim was ordered by the learned SAR pending the disposal of the plaintiff's claim and I too confirmed this part of the decision of the learned SAR bearing in mind that under clause 19 of the sub-contract, the plaintiff was entitled to set off against any money that was due from the plaintiff to the defendant.

(8) On 22 February 2001, the plaintiff has appealed to the Court of Appeal against my decision dated 19 February 2001.

(9) On 20 June 2001, the learned deputy registrar heard encl. 63.

(10) On 13 July 2001, the learned deputy registrar dismissed encl. 63 with costs.

(11) On 16 July 2001, the notice for pre-trial case management in compliance with Form 63 of the new O. 34 of the Rules of the High Court 1980 ("RHC") was filed by the plaintiff.

(12) Enclosure 77 – the subject matter of the present judgment, was dated 17 July 2001.

(13) On 22 August 2001, encl. 77 was served on the plaintiff's solicitors for the very first time.

Arguments Of The Parties And The Propositions Of The Law

It was argued on behalf of the defendant that the plaintiff's failure to file and serve the summons for directions pursuant to O. 25 r. 1 of the RHC was:

(a) intentional and contumelious; and

(b) had prejudiced the defendant because the defendant was unable to enjoy the fruits of their litigation.

The plaintiff, on the other hand, argued that the guiding principles to dismiss an action for want of prosecution would be:

(i) whether there has been an inordinate and inexcusable delay which had jeopardised the fair trial of the action (hereinafter referred to as the "first limb"); or

(ii) whether there has been an intentional and contumelious delay (hereinafter referred to as the "second limb").

I will now allude to an array of authorities governing the principles in regard to an application for dismissal for want of prosecution.

For starters, I will refer to the case of *United Malayan Banking Corp Bhd v. Palm and Vegetable Oils (M) Sdn Bhd & Ors* [1994] 3 MLJ 73, a decision of the then Supreme Court. In that case, the respondents contended that nine years had passed since the filing of the writ and during that period, important key witnesses had died and the control of the appellant bank had changed hands a few times and this would substantially prejudice them if the action were to go to trial. The appellants on their part contended that there had been reasonable and credible excuse for the delay as there were several negotiations between the parties which continued even after the action had been set down for trial. The Senior Assistant Registrar dismissed the appellant's action for want of prosecution and the learned judge upheld that decision. The appellants appealed and the then Supreme Court allowed the appeal. This was what the then Supreme Court said (see the headnotes):

(1) An action may be dismissed for want of prosecution when a party has been guilty of intentional and contumelious default and where there has been inordinate and inexcusable delay in the prosecution of the action. On the question of inordinate and inexcusable delay, the power should be exercised only where the court is satisfied that there has been inordinate and inexcusable delay on the part of the plaintiff and that such delay would give rise to a substantial risk that it was not possible to have a fair trial or is likely to cause serious prejudice to the defendants. Here, the trial judge had misapplied the above principles as, since the affidavit was filed by the appellants, there had been no further evidence to show which key witnesses of the respondents had since died.

(2) Although, admittedly, the negotiations between the parties were on a 'without prejudice' basis, it was a factor to be considered in favour of

the appellant. Moreover, the negotiations were, to some extent, being encouraged by the respondents in the belief that an out of court settlement would be reached.

(3) The judge also overlooked the fact that the respondents themselves had yet to file their list of documents within the stipulated period under the order of the Senior Assistant Registrar in the summons for directions. This was certainly a factor to be taken into account as to whether the respondents had contributed to the delay.

(4) Looking at the pleadings, the entire case of the appellant would depend on documents which are still in existence. Having regard to the above observations and bearing in mind that the prejudice alleged must be shown to be 'serious', on the facts and circumstances of this case, no serious prejudice to the respondents had been made out. The delay in the present case was due to the earnest desire of both parties to reach an amicable settlement which did not succeed.

Next would be the case of *Fenghua Development Sdn Bhd v. Asia Commercial Finance (M) Sdn Bhd* [1999] 4 MLJ 295, a decision of Clement Skinner JC (now judge). The facts of that case may be stated as follows. On 22 April 1998, on a summons for directions taken out by the plaintiff, the deputy registrar ordered that the plaintiff and the defendant serve on each other a list of documents verified by affidavit within 30 days and that the plaintiff then set the action down for trial within 30 days thereafter. Both the plaintiff and the defendant failed to comply with the direction to serve their respective list of documents. Upon the failure of the plaintiff to set down the action for trial as required, the defendant had on 19 September 1998 filed an application to strike out the action for want of prosecution under the former O. 34 rr. 2(2) and 8(1) of the RHC and/or under the inherent jurisdiction of the court. At the date of filing of the defendant's application to strike out, there had been a delay of two months to set the action down for trial. The deputy registrar allowed the defendant's application and being aggrieved the plaintiff appealed. The grounds relied upon by the defendant in instituting its striking out application were as follows: (i) that there had been a delay in prosecuting the action since it was filed in 1992; and (ii) that the plaintiff had failed to file a list of documents verified by affidavit and to set the action down for trial in accordance with the order made on 22 April 1998. For the defendant it was argued that: (a) such failure amounted to intentional and contumelious default; (b) that there was an inordinate and inexcusable delay for which no explanation had been given and which had caused prejudice to the defendant; and (c) that the plaintiff's failure amounted to complete, total or wholesale disregard for the rules of court which amounted to an abuse of process. The learned Judicial Commissioner allowed the appeal and this was what he said (see the headnotes):

(1) The plaintiff was faced with the prospect of its action being dismissed if the defendant's appeal was successful: to require that the plaintiff should nevertheless continue to prosecute its claim thereby incurring further costs and effort which may finally turn out to be a waste is to insist upon an unusually strict and impractical adherence to the rules which on the particular facts of this case is unwarranted. The plaintiff was entitled to adopt a practical approach and await the outcome of the appeal and in having done so cannot be faulted or accused of delay (see p 300G – H); *Bank Bumiputra (M) Bhd & Anor v. Lorrain Esme Osman* [1990] 2 CLJ 462; [1990] 1 CLJ (Rep) 633 followed. The defendant's complaint that there had been delay in the prosecution of this action after it was filed in 1992 was rejected (see p 301B).

(2) The orders made on hearing of the summons for directions on 22 April 1998 were no peremptory or 'unless orders' and neither was this a case where the court had called on the plaintiff to show cause under O. 43 r. 8(2) of the RHC. Further, the defendant had not shown any other conduct on the part of the plaintiff which might be characterized as intentional and contumelious (see p 302B-C).

(3) Whether a period of delay is or is not inordinate is a question of fact, to be decided on the facts of each particular case (see p 302E). The period of two months delay in this case cannot be described as inordinate. The fact that the plaintiff has not sworn an affidavit in reply to explain the delay is not fatal nor would it advance the defendant's case on this ground. Even if it can be said that the delay of two months is inordinate and inexcusable, the defendant must still show that such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action or is such as is likely to cause or have caused serious prejudice to the defendants (see p 303E). Further, what the plaintiff had omitted to do cannot be characterized as complete, total or wholesale disregard for the rules (see p 306E-F).

This would be followed by the case of *Sim Lim Finance Ltd v. Highlight Industry (Pte) Ltd & Ors* [1987] 1 MLJ 182; [1986] SLR 185, a Singapore case where the High Court was confronted with the issue of whether the plaintiffs' action should be dismissed summarily for want of prosecution. The High Court vigorously applied the principles as set out by Lord Diplock in *Birkett v. James* [1977] 2 All ER 801, namely:

> The power should be exercised only where this court is satisfied either (1) that the default has been intentional and contumelious, e.g. disobedience to a peremptory order of the court or conduct amounting to an abuse of the process of the court; or (2)(a) that there has been inordinate and inexcusable delay on the part of the plaintiff or his lawyers, and (b) that such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action or is such as is likely to cause or to have caused serious prejudice

to the defendants either as between themselves and the plaintiff or between each other or between them and a third party.

I pause here for a moment. I have this to say. In a striking out application for want of prosecution, the party seeking to strike out is certainly under a burden to prove to the court as far as the first limb as alluded to earlier is concerned:

(1) that there has been a delay;

(2) that the delay is inordinate and inexcusable; and

(3) that delay which is inordinate and inexcusable must jeopardise the fair trial of the action.

And that such requirements must be read conjunctively.

Whereas in regard to the second limb as alluded to earlier, the party seeking to strike out shall have the duty to show to the court:

(1) that there was a delay; and

(2) that such a delay was both intentional and contumelious.

Again, such requirements must be read conjunctively.

Reference was made to the case of *Ho Weng Kong v. Mann Foong Realty Sdn Bhd & Anor* [2000] 6 CLJ 478, where my brother judge Abdul Hamid Embong applied the Court of Appeal decision in *Trustees of Leong San Tong Khoo Kongsi (Penang) Registered v. Lee Boon Tin* [1998] 4 CLJ 368 and his Lordship then said at p. 483 of the report:

> In our Court of Appeal, Mokhtar Sidin, JCA applied the abovestated principle and recognised the birth of a new limb as a ground for striking out a plaintiff's claim by stating:
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> > This new limb as we understood it to be from the two cases in that where there is inordinate and inexcusable delay which involves complete, total or wholesale disregard of the rules of the court with full awareness of the consequences is capable of amounting to such an abuse so that if it is fair to do so, the action will be struck out or dismissed on that ground. From the decisions too, it appears to us that there is no necessity to show prejudice in such cases.

And flowing from this, it was argued for the defendant that the court need not now satisfy itself whether the defendant was prejudiced by the inaction of the plaintiff. That would certainly be food for thought. But the learned counsel for the plaintiff in the person of Mr Yip Huen Weng submitted that

the learned counsel for the defendant had comprehended the facts and principles enunciated in the case of *Ho Weng Kong (supra)* wrongly and that that case should be confined to its peculiar and unique facts and circumstances. I will now narrate the facts of the case in *Ho Weng Kong (supra)*. In that case, which was a consolidated action, the plaintiff was guilty of delay of over a year in seeking for a summons for directions. The plaintiff applied to the assistant registrar for an extension of time to file the summons for directions. The reasons given for the delay were that: (a) the lead action was still pending; (b) the plaintiff could not be contacted; (c) the solicitor representing the plaintiff had since left the firm; and (d) there was a pending appeal. The assistant registrar refused the plaintiff's application for an extension of time to file the summons for directions and allowed the second defendant's application to strike out the plaintiff's writ of summons with costs for want of prosecution under O. 25 of the RHC. The plaintiff appealed to the judge in chambers. In dismissing the appeals with costs, the learned judge had in fact dismissed the plaintiff's writs in respect of both the suits with costs. His Lordship held that (see the headnotes):

[1] In an application to strike out a writ, the court was traditionally guided by two-pronged principles stated by the House of Lords in *Birkett v. James*, that the action would be dismissed if the court is satisfied that: (i) the plaintiff's default has been intentional and contumelious, or (ii) the plaintiff or his lawyer has been guilty of such an inordinate and inexcusable delay that the defendant had been prejudiced by it.

[1a] The court need not now satisfy itself whether the defendant was prejudiced by the inaction of the plaintiff where the plaintiff was found to be blameworthy for the delay in total disregard of the rules in the RHC. That by itself, tantamounts to an abuse of process upon which this court might now act to dismiss the plaintiff's claim.

[2] The fact that the solicitor who was representing the plaintiff, had left the firm and that the plaintiff could not be contacted were too lame for this court to accept as excusable. The firm was not a one-man show and the plaintiff himself should be vigilant. He could not be excused because of an idle solicitor.

[3] Order 25 r. 1 of the RHC clearly states that a plaintiff must take out the summons required within the time frame provided. Therefore, it is a mandatory requirement which requires strict compliance and meticulous obedience. If flouted, it cannot be regarded as an irregularity that could be saved under O. 2 of the RHC.

Proceeding further, I must now refer to the case of *Dato' Leong Pow Kue & Ors v. Gan Kim Sing; Pentadbir Tanah Daerah Johor Bahru & Ors (Third Parties)* [1999] 5 CLJ 426, where I said at p. 455 to p. 457 of the report to the following effect:

> It is a correct statement of the law to say and I so say that for the defendant to succeed in his action to strike out the plaintiff's claim for want of prosecution, it is not sufficient for the defendant to establish inordinate and inexcusable delay. There is another burden imposed on the defendant and that would be for the defendant to produce evidence that a fair trial is impossible or that he has suffered or is likely to suffer some serious prejudice as a result of the delay (*United Malayan Banking Corp Bhd v. Palm and Vegetable Oil (M) Sdn Bhd* [1994] 3 CLJ 144). It is entirely a matter of fact and degree when one considers what is serious prejudice. In *Negara Properties Sdn Bhd v. Akitek Bersekutu Malaysia & Ors* [1996] 2 CLJ 923 at p. 932, the court there said:
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> > It is generally said that if the trial is based largely on oral evidence of the parties and their witnesses, and the long delay would have impaired the memory of the witnesses, there was in such cases a substantial risk that it was not possible to have a fair trial of the issues in the action. Similarly in situations where key witnesses have died or could not be traced. If on the other hand, the issues in the action were based essentially on documentary evidence, the delay may not give rise to a risk that it was not possible to have a fair trial.
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> But the High Court in *Sii Hing & Anor v. David TM Ting* [1993] 1 CLJ 537 rightly pointed out that:
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> > … although the issue in dispute related to various documents and so the nature and effect of those documents could be established essentially by documentary evidence, still, oral evidence would have to be led to establish the circumstances under which the documents came about. It would certainly be an advantage to know and understand something of their background.
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> I may add that the problem may be further confounded when the case is an old case and the makers of the documents cannot be found and therefore cannot attend court to testify. Without the makers of the documents the trial court would certainly be impeded unless of course the absence of the makers would not lead to the inadmissibility of the documents and those documents are not used for a hearsay purpose or those documents fall under the hearsay exception. In the same vein, the learned judge in the case of *The Plato [supra]* remarked at p. 839 of the report:
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> > Even if there are witness statements and ship's record available, the makers of these documents are still required to be present in court before these can be adduced in evidence.

> In *Biss v. Lambeth, Southmark and Lewisham Area Health Authority* [1978] 1 WLR 38, the facts showed that the action for negligence was left hanging over the defendants' heads for more than 11 years. It aggravated the anxiety of litigation and the delay was held to have affected the defendants' professional reputation. Here, Mr Gan Kim Sing, an experienced advocate and solicitor of excellent standing in Johor Bahru and the sole defendant must have been prejudiced. The psychological effect of the suit hanging over his head since 1989 must have been traumatic and beyond description. Mr. M. Pathmanathan, learned counsel for the defendant, submitted that the delay of more than seven months before the plaintiffs filed their summons for directions must be considered as inordinate and prejudicial to the defendant and a fit case for striking out for want of prosecution. The facts would certainly speak for themselves.

All these authorities would certainly be germane in adjudicating encl. 77.

To The Heart Of The Matter

On the facts and circumstances of the present appeal, I would, without hesitation, dismiss encl. 77 with costs and I so order accordingly.

In my judgment, there was no inordinate and inexcusable delay on the part of the plaintiff in prosecuting its claim. Even though the plaintiff had not taken out the summons for directions within two weeks after the reply was filed, it must be noted that the defendant had immediately filed a summary judgment application against the plaintiff in respect of the counterclaim. When judgment was awarded against the plaintiff by the learned Senior Assistant Registrar on 8 December 1999 together with the stay of execution, an appeal was filed to the judge in chambers and, in due course, I had disposed of that appeal and had adjudicated that appeal on 19 February 2001 in favour of the defendant. Aggrieved by my decision, the plaintiff had filed an appeal to the Court of Appeal on 22 February 2001. In the interim period, the defendant filed encl. 63. In the affidavit in reply of Tang Tuck Hong that was affirmed on 17 October 2000 for the plaintiff which can be seen in encl. 68, there it was averred from paras. 11 to 13 thereof that the plaintiff was awaiting for the outcome of the appeal to the Court of Appeal before deciding to take the next step in these proceedings. To me, the rationale behind the plaintiff's actions can readily be seen and appreciated. It was simply this. That in the event the plaintiff succeeds in the Court of Appeal, the parties would be in a position to proceed with the trial of both the main suit and the counterclaim and to dispose of both of them at the same time. It cannot be denied that the main suit and the counterclaim are directly related and entwined with one another and so both the claim and the counterclaim would, in all likelihood, require the presence and attendance of the same witnesses and experts. I would agree with the submissions of Mr Yip Huen Weng that what the plaintiff did were motivated by the practicality of the situation as well as the earnest and sincere

desire to avoid wastage of the court's time and to save the costs and expenditure of all the parties concerned by holding one trial and not two. At any rate, it must be emphasised that the defendant had not denied nor rejected the reasons advanced by the plaintiff in not filing the summons for directions within the strict requirements of the RHC. The case of *TM Feroze Khan & Ors v. Meera Hussain TM Mohamed Mydin* [2000] 1 MLJ 321, a decision of the Federal Court would certainly assist the plaintiff. There Chong Siew Fai CJ (Sabah and Sarawak) in allowing the appeal held that (see the headnotes):

(1) Whether a delay of over three months (the first alleged delay from 22 June 1995 to 30 September 1995) is inordinate and inexcusable depends on the facts and circumstances of each particular case. There existed two actions in tandem (ie the originating summons by the first defendant and the writ action by the plaintiffs), each with claims that are intricately related to those in the other. At the time the pleadings in the writ action were deemed to be closed, the plaintiffs had already filed the application seeking to intervene in the first defendant's originating summons, and the application was yet to be heard. The fact that the judge subsequently, in granting the plaintiffs leave to intervene in the originating summons, had also directed the plaintiffs to apply for consolidation of the two actions lends support to the reasonableness of the stand of the plaintiffs to await the outcome of their application to intervene and to set aside the vesting order. The alleged delay cannot be said to be inordinate and inexcusable (see pp 331I-332E); *Birkett v. James* [1978] AC 297 followed.

(2) In respect of the second alleged delay, the affidavit of the plaintiffs dated 10 April 1996 detailed the difficulty in extracting the orders granting them leave to intervene and showed that from the time the intervention order was given, they had actively taken all the necessary steps to get the order sealed (see p 332F-G). Considering that there was a direction to the plaintiffs from the judge to consolidate the two actions, no blame can be attached to the plaintiffs in acting in the manner that they did, ie applying for consolidation rather than taking out a summons for directions. There is no inordinate and inexcusable delay. Since there had been no inordinate and inexcusable delay, the question of substantial risk for a fair trial or prejudice to the first defendant consequential upon the delay (principle 2(b) in *Birkett v. James* [1978] AC 297) does not arise (see pp 332I-333A, H-I).

(3) The order for consolidation was made subsequent to the first defendant filing the application to strike out the plaintiffs' writ action. It is reasonable to assume that by ordering consolidation, the learned trial judge must have considered it proper for the plaintiffs' writ action to proceed and that there existed some common question of law or fact or some other reason rendering it desirable that the whole should be disposed of at the

same time. As such, there was merit for the plaintiff to contend that it was wrong for the learned trial judge to strike out the plaintiffs' writ action for want of prosecution when barely 14 days earlier he had ordered the consolidation of the first defendant's originating summons with the plaintiffs' writ action (see p 334B-D).

Of course, factually speaking, no two cases are alike. The facts in *TM Feroze Khan & Ors v. Meera Hussain TM Mohamed Mydin (supra)* are not similar to the facts of the present appeal, yet the principles as enunciated in the former case would still be applicable in adjudicating the present appeal in encl. 77. Here was the case where the plaintiff had taken into account the practicalities of the whole matter and in particular the facts of the present action and the plaintiff further considered that it was reasonable for them to await the outcome of the hearing of the Court of Appeal before they proceeded with the action proper. It was, to say the least, an act to economise the time and costs of all the parties involved in the present suit. In my judgment, since there were cogent and sincere reasons as to why the summons for directions was not filed within the strict parameters of the RHC, there was thus no inexcusable and inordinate delay on the part of the plaintiff in prosecuting the present suit. I would, with respect, agree with the approach adopted by Clement Skinner JC (now judge) in *Fenghua Development Sdn Bhd v. Asia Commercial Finance (M) Bhd (supra)*. But I venture to say that it would be purely based on the facts of each case in order to determine whether there was an inexcusable and inordinate delay. Indeed this was what I had alluded to in the case of *Dato' Leong Pow Kue & Ors v. Gan Kim Sing; Pentadbir Tanah Daerah Johor Bahru & Ors (Third Parties) (supra)*, especially at p. 454 to p. 455 of the report:

> It is purely a matter of fact and degree whether there has been an inordinate and inexcusable delay (*Datuk Samy Velu v. Karpal Singh* [1989] 3 MLJ 493; and *The Plato [supra]*). The term 'inordinate delay' has been interpreted in *Leong Seng Kiat v. Law Peng Guan & Ors* [1992] 2 CLJ 825 at p. 827; and Official Assignee of the *Property of George Chen Chih Hsiung v. Peter Chi Man Kwong & Ors* [1996] 1 SLR 353 to mean 'materially longer than the times usually regarded by the profession and courts as an acceptable period.' While the term 'inexcusable delay' means no more than there being no satisfactory explanation as to why the case did not proceed with due speed and diligence. In *Leong Seng Kiat v. Law Peng Guan & Ors [supra]*, the risk of fading memory was highlighted. There the third defendant was 76 years old and the only person who knew the background of the property dispute in which his family members were co-defendants. In such a case, the risk of fading memory was particularly acute. The third defendant too stressed that 'should anything happen to him, his family would not have any witness to testify in support of the defence,' The delay in filing the summons for directions in that case was about 2 1/2 years. Of course, once there is proof of inordinate delay,

the onus would naturally fall on the plaintiff to justify it (*The Plato [supra]*; *R. Rajasingam v. Balwant Singh Purba* [1996] 2 MLJ 549 and *Te Cheng Hoi v. Peh Im Kweng [supra]*). All too often, when cornered the plaintiff admits to having no excuse for the delay at all as seen in the case of *Public Finance Bhd v. Natcom Development Sdn Bhd & Ors* [1996] 4 CLJ 291; [1996] 2 MLJ 657 where counsel admitted that the delay was due to an oversight. In *Vasudevan v. T. Damodaran & Anor* [1981] 1 CLJ 84; [1981] 2 MLJ 150, after the close of the pleadings the plaintiff took no further steps to prosecute the action. Seven years after the commencement of the proceedings which was instituted some 10 years after the accrual of the cause of action, the defendants then proceeded to apply to have the action struck off. The court allowed the application. The delay was held to be inordinate. It seemed that no credible excuse was given for the delay. The plaintiff merely sought to attribute the delay to the time to trace certain missing documents but the court held that this was nothing more than a bare assertion. The court further held that the documents were neither relevant nor an issue. To the court it seemed that the real reason for the delay was that the lawyers were having difficulties getting instructions from the plaintiff. The plaintiff too gave another reason and that was to wait for the outcome in two other proceedings relating to the land in question. But the court held that those other proceedings were irrelevant to the present dispute and that the plaintiff had not actively pursued the present action even after those other proceedings as alluded to by the plaintiff had been disposed off. The case of *Confidence Concrete Sdn Bhd v. Shimizu – Peremba Sdn Bhd [supra]* is another good example. The plaintiffs' solicitors there sought to explain their inordinate delay in setting down the action for trial. It was argued that the firm had lost track of the file because the legal assistant in charge had gone overseas for six months and had left the firm upon her return. The court refused to accept this explanation as a valid excuse. It was also alleged that there was a delay in transferring the file docket from the Kuala Lumpur High Court registry to the Kuching High Court registry. The court however held the view that the delay in the transfer of the file did not present a real obstacle to the plaintiffs' solicitors as they could have set the action down for trial by filing their cause papers in Kuala Lumpur.

KS Chua & Co v. Chui Miang Chew & 5 Ors [1996] 2 CLJ 676 was a case involving dismissal of the plaintiff's claim for want of prosecution and there it involved the mistake of a solicitor and at p. 686 of the report I had this to say:

> From the recital of the facts, it is my judgment that the plaintiff took time prosecuting their claims after the case was transferred to the High Court on 6 May 1990 and such delay was, in the circumstances, prolonged, inordinate and inexcusable. Public policy demands that the business of the Courts should be conducted expeditiously. The plaintiffs clearly procrastinated and they authored their own downfall by not expeditiously prosecuting their claims.

In *Te Cheng Hoi v. Peh Im Kweng* [1994] 3 CLJ 501 at pp. 504-505, Vincent Ng J lucidly said:

> During the last decade, the English courts have become more willing to dismiss an action for want of prosecution. In the light of the above cases, it can be seen that Malaysian courts, like their English counterparts, are now also quite ready to strike down an inactive and dilatory plaintiff (if) he does not prosecute his case with due expedition. This salutary power of the court to dismiss cases for want of prosecution if exercised according to the principles laid down by the above-mentioned authorities, would help to reduce delays, clear the backlog of cases and conduct itself within the right side of the maxim that justice delayed is injustice denied. An indolent plaintiff should not be tolerated as this may cause injustice to the defendant in terms of the availability and usability of his important witnesses and documentary evidence.

Of pertinence would be the failure on the part of the defendant to furnish to this court details of any inexcusable and inordinate delay on the part of the plaintiff. The defendant merely employed the phrase "inexcusable and inordinate delay" without elaborating further and, in my judgment, the usage of such a phrase does not make a delay inexcusable and inordinate in any way. The defendant needed to go further and itemise the delay which was said to be inexcusable and inordinate. This immediately brings to the forefront the sage words of Gopal Sri Ram JCA in the case of *Khor Cheng Wah v. Sungai Way Leasing Sdn Bhd* [1996] 1 MLJ 223. To paraphrase what his Lordship had said, I need only to refer to the headnote where his Lordship in summary said:

> In all cases in which delay in approaching the court is in issue, the burden is upon the litigant who has delayed to render a satisfactory explanation for it. Whether the explanation in a given case is satisfactory depends upon the facts and circumstances of each case. In a matter which involves the exercise of discretion, it is for the judge in whom the law primarily vests the discretion (see p 229F) *Tuan Haji Ahmed Abdul Rahman v. Arab-Malaysian Finance Bhd* [1996] 1 CLJ 241 followed.

In all the circumstances of the case, the explanation advanced by the plaintiff was reasonable and I must accept that explanation accordingly.

I must proceed further. I must allude to the case of *KS Chua & Co v. Chui Miang Chew & 5 Ors* [1996] 2 CLJ 676. That was a case where the court had to consider two issues, namely:

(1) whether the plaintiffs' claim should be dismissed for want of prosecution?; and

(2) whether to allow the plaintiffs to proceed to trial would be vexatious and an abuse of the process of the court.

Factually speaking, *KS Chua & Co v. Chui Miang Chew & 5 Ors (supra)* are poles apart from the present appeal. In that case, the excuse put forward by the party that was guilty of delay was the ill health of its solicitor. Here, the manner in which the action had proceeded was clear on the face of the matter and that the pleadings would reveal the intricate and entwined relationship between the plaintiff's claim and the defendant's counterclaim which involved the calling of similar witnesses for the purposes of the trial. This fact was never rebutted by the defendant in its affidavit and it must be construed adversely against the defendant.

Another striking feature in the case of *KS Chua & Co. v. Chui Miang Chew & 5 Ors (supra)* would be this. In that case, the matter had not progressed for a period of four years and it had remained idle. Whereas, in the present case, the action has always been active in the court simply because the defendant had filed various interlocutory applications and this court had heard those applications expeditiously. With respect, the indolent party in *KS Chua (supra)* had not advanced a "credible excuse" and the same cannot be said of the plaintiff in the present suit.

In regard to the question of "serious prejudice", it must be emphasised that the defendant had not proved nor offered any evidence as to how the defendant had suffered "serious prejudice" as a result of the delay and the defendant too had failed to prove that it had been prejudiced to a fair trial of the action. By way of a frontal attack, it must be highlighted that the defendant had failed to plead the issue of "serious prejudice" in any of its affidavits and so there was no necessity for this court to consider this issue at all. Just like the case of *Fenghua Development Sdn Bhd v. Asia Commercial Finance (M) Bhd (supra)*, the defendant in the present appeal had failed to show in what way any delay by the plaintiff had prejudiced the fair trial of the action. Abdul Aziz Mohamed J (now JCA) in *Bernard Chai v. Klang Port Authority* [1999] 5 CLJ 481 was confronted with the same impediment and this was what his Lordship said (see p. 486 of the report):

> They simply say that a fair trial would not be possible and that the delay would bring serious prejudice to the defendants' case. They do not attempt to elaborate or explain their assertion. For that reason, and in view of what I have stated earlier about what the trial of the action would involve, I reject the defendants' assertion that a fair trial would not be possible or that the defendants' case has suffered or would suffer serious prejudice.

In the same vein, Lai Kew Chai J in *Sim Lim Finance Ltd v. Highlight Industry (Pte) Ltd & Ors (supra)* had this to say (see p. 186 of the MLJ report):

> I had a second reason for not dismissing the action. I was not persuaded that the delay, though flagrant and inordinate, would give rise to a substantial risk that it would not be possible to have a fair trial of the issues in the action. Nor was I persuaded that such delay was likely to cause or had caused serious prejudice to the third defendants.

The sum total of it all would be this. That the defendant had failed to produce cogent evidence to prove that the alleged delay by the plaintiff had seriously prejudiced the fair trial of the action. This was my judgment and I so hold accordingly.

It must be recalled that the plaintiff had proceeded with the action immediately after the learned deputy registrar had rejected encl. 63. The plaintiff had filed Form 63 and was keen to have the action case managed by this court and the very act of filing Form 63 was instrumental in curing any alleged prejudice, be it serious or otherwise, which the defendant claimed that it had suffered. It was pointed out that the plaintiff was now anxiously awaiting the return of the duly sealed copy of Form 63 so that the plaintiff could proceed ahead with the progress of this action.

It was argued by Mr Lam Chong Seng, the learned counsel for the defendant, to the effect that the defendant had suffered prejudice as they have been denied the right to enforce the summary judgment which the learned Senior Assistant Registrar had granted on 8 December 1999 and which was affirmed by this court on 19 February 2001. This argument was not well received by Mr Yip Huen Weng and it was his submissions that, on the facts of the case and in the circumstances surrounding this action, the learned Senior Assistant Registrar and this court had wisely held that the summary judgment to be stayed until the final trial of the action. It was for these reasons that Mr Yip Huen Weng argued, quite rightly, that the defendant cannot now argue that they have been denied by the plaintiff's actions from enjoying their alleged "fruits of litigation" because how could the defendant enjoy their success when there was a stay of the summary judgment. Incidentally, the conduct of the defendant was quite deplorable. Under O. 25 of the RHC, there was no bar for the defendant to take out the summons for directions in the event the plaintiff failed to do so. But alas, the defendant did not avail themselves of the provisions of O. 25 of the RHC. It was for these reasons that the plaintiff argued that the defendant had maliciously filed encl. 63 to strike out the writ of summons and the statement of claim for want of prosecution. If indeed the defendant had been prejudiced by the denial of their "fruits of litigation" as alleged, surely the

defendant could remedy that prejudice by filing the summons for directions under O. 25 of the RHC and expeditiously despatch the action for trial.

I will now allude to another point. It was submitted that the delay, if any, on the part of the plaintiff in filing the summons for directions was neither intentional nor contumelious within the legal definition of that word as enunciated in the case of *Janov v. Morris* [1981] 3 All ER 780. In that case, Dunn LJ writing a separate judgment for the Court of Appeal referred to the speech of Lord Diplock in *Birkett v. James* [1977] 2 All ER 801 at 807, [1978] AC 297 at 321 in order to define the meaning of the words "intentional and contumelious." I can do no better than to refer to the speech of Dunn LJ and I do so now (see p. 783 of the report):

> In *Birkett v. James* Lord Diplock said ([1977] 2 All ER 801 at 807, [1978] AC 297 at 321):
>
> > The court may and ought to exercise such powers as it possesses under the rules to make the plaintiff pursue his action with all proper diligence, particularly where at the trial the case will turn on the recollection of witnesses to past events. For this purpose the court may make peremptory orders providing for the dismissal of the action for non-compliance with its order as to the time by which a particular step in the proceedings is to be taken. Disobedience to such an order would qualify as 'intentional and contumelious' within the meaning of the first principle laid down in *Allen v. McAlpine*. But where no question of non-compliance with a peremptory order is involved the court is not in my view entitled to treat as 'inordinate delay' justifying dismissal of the action in accordance with the second principle in *Allen v. McAlpine*, a total time elapsed since the accrual of the cause of action which is no greater than the limitation period within which the statute allows plaintiffs to start that action. To dismiss the action in such circumstances would, in my view, involve an error in principle in the exercise of judicial 'discretion' which it is the function of the appellate court to correct.

Flowing from the above passages, it was submitted that in the absence of any non-compliance of any peremptory order of the court, the plaintiff cannot be accused by the defendant to have committed a delay which was "intentional and contumelious." I would certainly agree with these salient submissions. Incidentally, the approach of Dunn LJ in *Janov v. Morris (supra)* was followed by Abdul Aziz Mohamed J (now JCA) in *Bernard Chai v. Klang Port Authority (supra)* and Clement Skinner JC (now J) in *Fenghua Development Sdn Bhd v. Asia Commercial Finance (M) Bhd (supra)*. In short, in the present appeal, there was no peremptory or unless order being made and so, it was my judgment, that the non-compliance by the plaintiff to file the summons

for directions within the strict definition of O. 25 of the RHC cannot be said to be "contumelious". Furthermore, the defendant did not advance any evidence nor make any averment of any "contumelious" conduct on the part of the plaintiff and so there was no basis at all to say that the conduct of the plaintiff was "contumelious".

In regard to the issue that the period of limitation had not expired, I have this to say. It is now trite law that if the limitation period has not expired, this court should act slowly in deciding whether to strike out the action and should only do so in rare and exceptional circumstances. In the present appeal, no rare and exceptional circumstances exist. An authority for this simple proposition can be seen in the case of *Mercantile Bank Ltd v. JP Pereira* [1979] 2 MLJ 1; [1978-1979] SLR 133, a decision of the Court of Appeal of Singapore. On the facts of the present appeal, it was part and parcel of my judgment that:

(1) the limitation period for this action has not expired to date;

(2) there was no rare and exceptional circumstances pleaded, shown or proven by the defendant to justify the striking out of this action for want of prosecution; and

(3) the defendant had not taken any steps to obtain peremptory orders from this court and so the defendant must be deemed to have waived their right to do so.

For these reasons, I refused to strike out the action for want of prosecution (*Lee Mun Tuck v. Tan Chin Kah & Anor* [1991] 1 CLJ 631; [1991] 4 CLJ (Rep) 929).

The final issue that will be alluded to in this judgment would be the issue of the Damocletian prejudice. According to Abdul Aziz Mohamed J (now JCA) in *Bernard Chai v. Klang Port Authority (supra)* at p. 487 of the report "that the notion of Damocletian prejudice, that is prejudice to peace of mind, was meant to bring relief from the effect of *Birkett v. James* to a defendant who had already been greatly prejudiced in the conventional sense by the plaintiff's delay in issuing his writ and cannot possibly be further prejudiced in the same sense by any delay after the issue of the writ." In short, what his Lordship meant was this. That the Damocletian prejudice cannot stand alone to justify the striking out of an action for want of prosecution. His Lordship aptly said (see p. 487 to p. 488 of the report):

> It follows, I think, that a defendant is not entitled to rely for relief on Damocletian prejudice if he does not show that he had been prejudiced in the conventional sense by delay in the issuance of the writ. He cannot succeed in

having the action dismissed for want of prosecution on a complaint of Damocletian prejudice alone. Lord Denning's solution was not intended to be applied as an alternative or substitute for the conventional approach. If it was, I fear that it would become quite easy to dismiss an action for want of prosecution. It was intended to be applied complementarily to the conventional approach. Lord Denning was careful to say that it was a solution that the Court of Appeal had to seek for 'consistently with what the House of Lords have said'. In this respect I think there is significance in the last sentence of the passage from *Biss* cited earlier, where mention is made of the Damocletian prejudice being added to conventional pre-writ prejudice. The defendants in this case, as I said earlier, have not demonstrated in what manner they had been prejudiced in the conventional sense by the plaintiff's delay in commencing this action.

But in the context of the present appeal, the defendant had failed to plead Damocletian prejudice in its affidavits and they must be barred from raising this vital issue.

For all these reasons, I reiterate that encl. 77 must be dismissed with costs.